

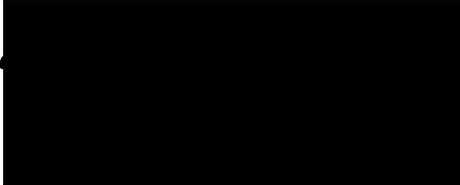
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U.S. Citizenship
and Immigration
Services

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BC

FILE: SRC 03 052 53219 Office: CALIFORNIA SERVICE CENTER Date: MAR 25 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Brazilian goods trading company. It seeks to employ the beneficiary permanently in the United States as a secretary. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner states that, based on its bank statements, it has had the ability to pay the proffered wage since the petition was filed in April 2001. The petitioner submits no new documentation.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$13.30 per hour, which amounts to \$27,664 annually.

With the petition, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the tax year beginning June 1, 2000 and ending May 31, 2001. The petitioner also submitted its FirstUnion business checking bank statements from March 30, 2002 to September 30, 2002.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 20, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its 2001 and 2002

corporate income tax returns, copies of each employee's W-2 for 2001 and 2002, and copies of the petitioner's bank statements from April 2001 to March 2002 and from October 2002 to the present.

In response, the petitioner submitted Form 1120 corporate tax returns for the year beginning in June 1, 2002 and ending on May 31, 2003. The petitioner also submitted bank statements from three banks covering the period of April 2001 to June 2003.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 26, 2003, denied the petition. The director noted that the petitioner had not submitted its 2001 corporate income tax return. The director also stated that the petitioner's total income was significantly less in 2002 than it was in 2000, and that the tax returns did not establish the petitioner's ability to pay the proffered wage. The director also examined the petitioner's bank statements and noted that the petitioner's ending balance never exceeded \$8,000. The director determined that the bank statements did not show sufficient funds to pay the beneficiary the proffered wage.

On appeal, the petitioner states that it has sufficient funds available to pay the beneficiary's wage since April 2001 and refers to the bank statements previously submitted.

The director in her request for further evidence asked for further documentation of the petitioner's bank statements. The petitioner submitted banking statements with the initial petition, and then submitted additional statements in response to the director. Both the petitioner's and the director's reliance on the ending balances in the petitioner's bank account are misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statement somehow reflect additional available funds that were not reflected on its tax returns.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner submitted no evidence, such as W-2 statements or pay stubs, to establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's

gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income. With regard to the petitioner's net income as of April 2001, the petitioner's corporate tax return for June 2000 to May 2001 indicates a negative net income of \$3,270. In the tax year from June 2002 to May 2003, the petitioner had a net income of \$2,716. Neither figure is sufficient to establish that the petitioner could have paid the proffered wage out of its net income for the period of time in question. In addition, as previously stated, the petitioner did not submit its corporate income tax return for the period of time from June 2001 to May 2002. Therefore, the AAO cannot analyze the petitioner's ability to pay the proffered wage by means of its net income for this period of time.

In addition, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. In addition, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's tax returns reflect the following information for the tax years that began in June of 2000 and 2002:

	2000	2002
Taxable income ²	\$ -3,270	\$ 2,716
Current Assets	\$ 3,370	\$ 17,222
Current Liabilities	\$ 0	\$ 10,485
Net current assets	\$ 3,370	\$ 6,737

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

² Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

The petitioner has not demonstrated that it paid any wages to the beneficiary during either tax year. As previously illustrated, the petitioner shows a taxable income of -\$3,270, and net current assets of \$3,370 as of the priority date in April 2001. Thus, the petitioner's net current assets in 2000-2001 were not sufficient to pay the proffered wage of \$27,664. Therefore the petitioner has not demonstrated the ability to pay the proffered wage as of the priority date. With regard to the period of time from June 2001 to May 2002, the petitioner did not submit its corporate income tax return. In the following tax year, 2002, the petitioner had a net income of \$2,716 and its net current assets were \$6,737. This amount of net current assets is not sufficient to pay the proffered wage in 2002. Although on appeal the petitioner asserts that its banking statements establish that it has sufficient funds to pay the beneficiary wage, as previously stated, the AAO does not view the bank statements as persuasive evidence. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage from the salient portion of 2001 to the present. Therefore, the director's decision shall stand, and the petition shall be denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.